NG THOONG CHEN

v.

KEDAH MARBLE SDN BHD

HIGH COURT MALAYA, ALOR SETAR
BALIA YUSOF J
[WINDING UP PETITION NO: 28-41-2000]
20 MAY 2002

COMPANY LAW: *Winding up - Petition - Opposition to petition - Affidavit in reply - Delay in filing - Failure to file affidavit in reply seven days before hearing date - Whether fatal - Whether could be remedied - Companies Act 1965, ss. 218, 221 - Company (Winding up) Rules 1972, rr. 30, 193, 194*

The petitioner in this case had filed a petition to wind up the respondent pursuant to the provisions of the Companies Act 1965 ('the Act'). The petition was first fixed for hearing on 22 March 2000 but was postponed to 26 April 2001 and subsequently to 1 August 2001 whence the respondent filed an affidavit in reply and applied for an adjournment of the hearing. The matter was then adjourned to 4 October 2001 and thereafter to 3 February 2002. In the meanwhile, on 22 January 2002, a further affidavit was filed by the respondent to oppose the petition. Before the learned judicial commissioner, the petitioner objected to the filing of the affidavits arguing that, by virtue of r. 30 of the Companies (Winding Up) Rules 1972 ('the Rules'), the same ought to be filed at least seven days before the first hearing date herein. The respondent contended that the court ought to invoke r. 194 of the Rules and condone the irregularity, as no injustice was caused to the petitioner. The question that arose was whether the affidavits aforesaid were filed in breach of r. 30 of the Rules, and if so whether the court ought to exercise its discretion under r. 194 thereof and remedy the irregularity.

Held:

[1] The respondent, by filing an affidavit in reply on the hearing date on 1 August 2001 was in breach of r. 30(1) of the Rules. (pp 61 h-i & 62 a)

[1a] Nevertheless, bearing in mind such authorities as *Arab Malaysian Merchant Bank v. Orient Apparel Bhd* and *Arise Enterprise Sdn Bhd v. Feiyen Sanhark Hardware Sdn Bhd*, in relation to the exercise of the court's power under r. 194 of the Rules, the court must look at all the circumstances of the case before penalising the respondent. (pp 62 c-h & 63 c)

[2] On the facts and in the circumstances, no injustice has been caused by the defect or irregularity in question. It has also not been shown that the injustice, if any, cannot be remedied by an order of the court. This being the case, the court ought to exercise its power under s. 221 of the Act and r. 194 of the Rules in favour of the respondent and allow the affidavits to be used in the hearing of the petition on merits. (p 63 d-e)

[Objection dismissed.]

Case(s) referred to:

Arab Malaysian Merchant Bank v. Orient Apparel Bhd [1999] 2 CLJ 647 ***(foll)***

Arise Enterprise Sdn Bhd v. Feiyen Sanhark Hardware Sdn Bhd [2002] 5 CLJ 13 ***(foll)***

Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd [1997] 3 CLJ 485 ***(refd)***

Megat Najmuddin v. Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645; [2002] CLJ JT(2) ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 218, 221

Companies (Winding Up) Rules 1972, rr. 30(1), 193, 194

For the petitioner - Prakash Mehta; M/s Prakash & Co
For the respondent - Mohd Rawi; M/s Mohd Rawi, Andrew & Assocs
For the contributor - SK Lim

Reported by WA Sharif

JUDGMENT

Balia Yusof J:

This petition for winding up was filed on 19 December 2000 and served on the respondent on 11 February 2001. The petition was based on a notice under s. 218 of the Companies Act 1965 dated 20 September 2000 and served on the respondent on 24 September 2000. Through the said notice, the respondent is deemed to be unable to pay its debt to the petitioner in the sum of RM626,100. The first date of hearing for the petition was fixed on 22 March 2000 but was postponed to 26 April 2001. On the said date the papers were still not in order and the petition was then adjourned to 1 August 2001 for hearing. On this date, an affidavit in reply affirmed by one Zainal Abdin bin Rashid (encl. 26) was filed by the respondent and a copy of the same was served on counsel for the petitioner in court. At the same time counsel for the respondent company also applied for an adjournment of the matter. The matter was adjourned by the court to 4 October 2001 with the respondent being ordered to pay costs of RM500 to the petitioner. When the case came up for hearing on 4 October 2001 counsel for the respondent again sought for an

adjournment of the matter on the ground that he needed time to file a further affidavit and this was objected to by the petitioner. Again the court allowed the postponement with the petitioner being awarded with costs for RM650. The petition was then adjourned to 3 February 2002 for hearing.

In the meantime, a further affidavit affirmed by the said Zainal Abidin b. Rashid was filed by the respondent on 22 January 2002. It was served on the petitioner on 24 January 2002. By a letter dated 28 January 2002 addressed to the counsel for the respondent company, the petitioner gave notice that a preliminary objection to the said affidavit will be raised during the hearing of the matter.

At the hearing of the petition on 3 February 2002, counsel for the petitioner raised a preliminary objection on the admissibility of the affidavits filed by the respondent. It is contended by the petitioner that the affidavits should be filed before the date of the first hearing and on the authority of *Crocuses & Daffodils (M) Sdn. Bhd. v. Development & Commercial Bank Bhd.* [1997] 3 CLJ 485 they ought to be excluded on the ground that r. 30 of the Companies (Winding Up) Rules 1972 has been breached. It was further contended that r. 193 of the same cannot be relied upon by the respondent as there was no application made by the respondent.

In reply, counsel for the respondent cited the loss of certain books/record to be the cause of the delay in filing their affidavit in reply and urged this court to invoke r. 194 of the Companies (Winding Up) Rules 1972 to condone the irregularity, contending that no injustice is caused to the petitioner and citing the case of *Arise Enterprise Sdn. Bhd. v. Feiyen Sanhark Hardware Sdn. Bhd.* [2002] 5 CLJ 13 as an authority. It was further contended that the postponement was granted by the court to allow him to file the further affidavit.

In *Crocuses & Daffodils (M) Sdn. Bhd. v. Development & Commercial Bank (supra)* the Court of Appeal held that by their words and expression, r. 30(1) of the Companies (Winding Up) Rules 1972 is mandatory in nature and as such it must be strictly followed. The said rule reads:

> 30. Affidavits opposing petition and affidavits in reply
>
> (1) Affidavits in opposition to a petition that a company may be would up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.

As disclosed from the facts adumbrated earlier, when the case first came up for hearing on 26 April 2001 the papers were still not in order and the matter was accordingly adjourned to 1 August 2001. On this date the respondent filed an affidavit in reply and served on the petitioner a copy of the same. That is

certainly in breach of r. 30(1). I pause here to note that the present solicitors handling the matter for the respondent took over the matter from a previous solicitor and the notice of change of solicitors was filed on 26 May 2001.

The petitioner subsequently filed an affidavit in reply dated 12 September 2001 to the respondent's affidavit prior to the next hearing date which was fixed on 4 October 2001. It was on this date that the respondent's counsel sought for a further adjournment to enable the respondent to file a further affidavit. The court once again allowed the postponement and like the earlier instance, awarded costs to the petitioner. The respondent's further affidavit dated 22 January 2002 was served on the petitioner on 24 January 2002 before the next hearing date of 3 February 2002.

Having heard the submissions of the counsels and the advantage of scrutinising the authorities submitted, I am in concurrence with the view expressed by his Lordship Kang Hwee Gee J in the case of *Arab Malaysian Merchant Bank v. Orient Apparel Bhd.* [1999] 2 CLJ 647 at p. 653 thus:

> Having read *Crocuses* carefully it would appear to me that all the Court of Appeal had ruled in that case was that r. 30 was mandatoty in nature. It did not however consider the power of the Court to condone the irregularity under s. 194(1) of the Companies (Winding Up) Rules 1972 which provides that no proceedings under the Act or the rules shall be invalidated by any formal defect or any irregularity unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularities and that the unjustice cannot be remedied by any order of the Court. It follows therefore the Court of Appeal's decision in *Crocuses* must be construed to apply only to the factual peculiarity of that case.

Syed Ahmad Helmy JC in the case of *Arise Enterprise Sdn. Bhd. v. Feiyen Sanherk Hardware Sdn. Bhd.* [2002] 5 CLJ 13 expressed the same view on *Crocuses* and further said at p. 16:

> Though I subscribe and am bound by the mandatory time frame for the filing of affidavits in opposition as laid down by Crocuses nevertheless I am not restricted by that case not to exercise the discretionary powers as conferred by s. 221(2)(b) Companies Act 1965 and r. 194 of the Companies (Winding Up) Rules 1972.

I am in entire agreement with the above statement and have no hesitation in expressing my approval of the said views in relation to the exercise of the court's power under r. 194.

Speaking of the Rules of the Court of Appeal 1994, Mohtar Abdullah FCJ in *Megat Najmuddin v. Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645; ([2002] JT(2)) at p. 690 (pp. 36-37) said:

Rules are rules! They must be obeyed. Numerous judgments can be cited in support of the firm stand on the necessity for a strict adherence to the rules. I agree. However, a judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the cold letter of the law. The judge should be mindful of r. 102 of the RCA which provides that:

> non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceeding void.

The said rule also provides for the discretionary power of the judge to deal with such irregularity "in such manner and upon such terms" as the judge thinks fit. Therefore, a fair minded judge should look at all the circumstances of the case before penalising the party who infringes any particular rule of procedure.

Guided by those words, and having considered the facts and circumstances of this case, I find that no injustice, let alone substantial injustice has been caused by the defect or irregularity in this case and further, it has not been shown to me that the injustice if any, cannot be remedied by any order of the court. This court is empowered under s. 221 of the Companies Act 1965 and r. 194 of the Company (Winding Up) Rules 1972 in hearing such application to exercise its discretion according to the justice of the matter. In exercising such discretion the court must weigh the interest of both parties and in accordance with the facts and circumstances of the case. Accordingly, I dismiss the preliminary objection by the petitioner and allow the affidavits to be used in hearing the petition for winding up on its merits.